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ABSTRACT

Society is questioning the role of law and of legal education. The law curriculum is attacked for being oriented toward subject matter likely to produce retainers, and not to the quality of life for the citizen and consumer. Law teachers are accused of assuming a "hard nosed" stance in their teaching, debunking whatever passions students bring to the subject matter. Law schools are urged to adopt new teaching methods, such as audio visual techniques, clinical experience and teaching machines. Others argue for the abolishment of the "boring" third year, and still others advocate abandoning the concept of the legal profession as a learned profession by developing relatively short, specialized training for specific legal tasks. All of these suggestions have many inherent disadvantages and provide no real answers to the problems confronting society. Two more useful changes would be to (1) discard the ideology of the case method. A class needs not only the challenge of problems, but the example, from the teacher, of problems successfully solved. (2) Increase the role and importance of the subjects of jurisprudence and the legal profession in the curriculum. The crisis of confidence challenges the legitimacy of the existing legal order and must be met by legal education on its own terms. (AF)

Group 23
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LEGAL EDUCATION AND THE CONTEMPORARY SOCIAL CRISIS*

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There is no mandate for change in legal education. Indeed, I sometimes fear that there is no mandate for legal education. The law schools are at their best wards of the universities. The signs are all too clear. Law schools have faculty student ratios that would be unacceptable in a decent graduate school. They have an enrollment growth well below that of higher education generally. Night schools with part time faculties still train a substantial minority of law graduates. There are no special government funding programs for law and law schools are excluded from many forms of government and foundation support available to other branches of higher education.

Ambivalence about legal education is not new to our society. The tension between the concept of law as an elitist institution manned by educated experts and law as an egalitarian institution implementing the popular will through majoritarian procedures is at the center of our constitutional structure. We have called upon the law through the Bill of Rights and the concept of separation of powers to provide checks on the democratic will. Partly as a consequence we have been unwilling to leave the law to a legal profession. The customs of the English bar transferred intact to some of the colonies were destroyed after the revolution. Under the influence of Jacksonian egalitarianism we had no professional bar through much of the nineteenth century. Those who wished to practice law did so. For instance, the Constitution of the State of Indiana provided until 1933 that "every person of good moral character being a voter, shall be entitled to admission to practice law in all courts of justice." We now have a set of qualifications which are rigorous in form -- six years of higher education and a special examination. But because of the ease with which the required training can be obtained and the narrow and unimaginative content of the examinations these qualifications are all too often only obstructionist in practice.

It is because of and not in spite of these tensions that legal education has at its best offered a special relevance and excitement. Forced by their subject matter to deal with material not of their own making, the law schools have constantly looked outward, not inward, to define and understand their subject matter. The absence of liberal financial support and high faculty student ratios have of necessity made teaching the central occupation of the law professor. The present unease about legal education has its genesis in these two fundamentally healthy aspects of law school life. Our society is questioning the role of law and with this questioning must come renewed uncertainty about the appropriate form of professional training.

It is no accident, I think, that the last two periods of reorganization in law school training corresponded to two great periods of crisis in American society. Langdell, Ames and Keener built the case method law school in response to the

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complexities of national urban industrialism and the decay of local rural agrarianism. Realism developed as a response to the depression and the newly articulated concept of the law as an instrument not simply of justice between man and man, but of positive social control. Today the law schools are called upon to respond to the changes that seem to be upon us but whose scope and direction I, at least, find baffling to understand. In this time of uncertainty a number of reforms are urged upon legal education, many of which I think offer little real amelioration of the tensions that beset us.

The most direct attack on the law school curriculum comes from those who view it as responsible at least in part for the present defects of our society. In a recent New Republic article my co-analyst Ralph Nader argued that the law school curriculum has been oriented toward subject matter likely to produce retainers and has directed the legal profession away from the problems of the quality of life for the citizen and the consumer. William Pincus, President of the Council on Legal Education for Professional Responsibility, has argued that the failure of the present curriculum is proven by the inequality in the provision of legal services in this country today.

The observation that the bar itself is conservative is not a new one. Alexis de Tocqueville observed the special status of lawyers in American society and concluded that the bench and bar constituted the American equivalent of an aristocracy. What is new is the suggestion that the law school curriculum is responsible. The suggestion is both flattering and troublesome, particularly for the many law teachers who see themselves as rebels against or even refugees from large corporate practice. The argument that the law schools have in fact biased their training toward service to the rich and powerful is based on two facts about the law school curriculum. First, the major focus of the curriculum is on commerical, corporate and regulatory law. And second, law teachers generally assume a "hard nosed" stance in their teaching, debunking whatever passions the students bring to the subject matter.

It is true that a substantial portion of the law school curriculum is presently concerned with the activities of large business, labor and governmental institutions. This has not always been so, and as recently as the early 1930's the curriculum spent substantially greater time on the problems of the ordinary citizen in our society. But there is a valid explanation for this focus. If the law is viewed as an historical process, then one of the principal problems for legal education is to bring the law graduate "up to date." The law graduate must be prepared to practice with his seniors at the bar who will have been shaped by their last thirty years of experience. The simple fact is that the primary domestic concern of the society for the past thirty years has been the development of effective control of and checks on the abuse of power by large corporations through the development of effective countervailing labor and governmental institutions. Preble Stolz has observed, in a paper soon to be published in my book "Clinical Education and the Law School of the Future" that law schools, like armies, tend to train their graduates for the last war. True enough. But we have the advantage over the generals that our wars are fought continuously, and the last battle took place only minutes ago.

The second element of the law school curriculum which is cited in support of the view that law schools inculcate conservatism is the traditionally critical, debunking stance of the law teacher. Such an attitude is anathema to those for whom the true light shines brightly. But properly handled, such an attitude has an important professional role to play. The bar must perform a conflict resolving role in dispute situations. Both as advocate and as negotiator, the lawyer must be able

to identify the hard center of his client's and his adversary's positions in an atmosphere often of passion and deception, even self-deception. Although the direct thrust of the classroom: "What in the world do you mean Mr. Smith?" may be inappropriate for the more delicate forum of client relations (although not always the negotiating table), a lawyer must always listen with an inner ear for the relevant as opposed to the irrelevant, for the vital as opposed to the merely desired. The way to probe for the heart of a position is by questioning it, and that is exactly the process that should occur in the classroom. Secondly, since lawyers may often need to function in an atmosphere of hostile argument, students need to learn to think and argue effectively in such an atmosphere. There is danger of overkill here -- a browbeaten student may sink into three years of sullen and unproductive silence. But when used with sensitivity the technique can teach students the ability to hold their own effectively in an unsupportive and public atmosphere. Lawyers, after all, do not graduate to a life of calm and detached reflection.

The second major reform urged upon the law schools is the adoption of new teaching methods. Teaching machines, audio visual techniques and clinical experiences are all advanced. My objection here is that these new techniques are often urged without regard to the educational objectives they may or may not further. Although these techniques may offer variety for a bored student body, they may prove to be only expensive baubles if they are not used in furtherance of some important educational objective. For instance, it is clear that the rules of negotiable instruments could be efficiently communicated by means of a properly programmed teaching machine. But could students so trained ever appreciate the grotesque incongruity that has converted a law of merchants' money into a device for defrauding consumers? Is the more important lesson to memorize the requisites of negotiability or to understand how a body of legal rules can acquire a life of their own and how such rules then misapplied, will someday die? Would a generation of lawyers trained by machine be even more likely than the present generation -- if that is possible -- to regard the rules of negotiability as some God-given firmament eternally fixed in the legal sky? The clinical method is the most important and potentially the most useful of these techniques. I have discussed it at length in my foreword to "Clinical Education and the Law School of the Future." I will only note here that a poorly conceived clinical program can quickly become for students a routine, boring and uneducational experience.

The third major reform urged upon us is the simplest, it is to stage a partial but hopefully well ordered retreat. The students we are told are bored. They are most bored in the third year. Therefore cut out the third year. Hopefully, we can do this while preserving the resources we presently command and deploy them more effectively in the two years remaining. I have considerable sympathy for this proposal, but an orderly retreat is the most difficult of all maneuvers. I am skeptical whether a law school can be made more interesting merely by the reduction of a year. If we really teach everything that is needed in two years, why not in one? The elimination of the third year may simply make the second year the most boring of the two remaining. The urge to abdicate takes a number of different forms -- including programs where students are simply shipped off campus with little or no supervision to do their thing. It is all too pervasive in legal education today. Its influence is on the whole for the bad because it makes for an easy avoidance of the need to find solutions to the very real problems that beset us.

The fourth major reform urged on legal education is the most radical. We are told that the answer to increased need for legal services today is to abandon the concept of the legal profession as a learned profession by developing relatively

short, specialized training for specific legal tasks. For those of you who don't think that proposals of this type are being seriously urged I only refer you to Congressman Pucinski's recent bill for accelerated legal studies consisting of two years of college, two years of law school and two years of service in a neighborhood legal aid clinic. For another example, I can visualize as a teacher of criminal procedure an intensive six month program in criminal defense which would turn out graduates better prepared technically than our present graduates to practice criminal law. Criminal law is a relatively closed system and such a program could offer intensive training in the techniques of defense representation. But I fear the costs of such a system would in the long run be great. We could no longer speak of the legal profession as an entity but simply as an aggregation of highly specialized technicians whose function is to keep the machinery of government running. Criminal defense lawyers who are criminal defense lawyers and nothing else would all too soon see themselves not as defenders of the culture of legal process but merely as high level clerical personnel whose responsibility is to assure the smooth and efficient running of the process. Unfortunately, I do not simply speculate about this possibility. In the last ten years we have witnessed in all too many jurisdictions the ease with which a specialized public defender can be co-opted by the courts rather than the clients he theoretically serves. Karl Llewellyn, speaking at the dedicatory celebration of the new University of Chicago Law Building in 1960, pointed out the inherent flaw of technique oriented education for lawyers.

> "The truth, the truth which cries out," he said, "is that the good work, the most effective work, of the lawyer in practice roots in and depends on vision, range, depth, balance, and rich humanity--those things which it is the function, and frequently the fortune, of the liberal arts to introduce and indeed to induce. The truth is therefore that the best practical training a university can give to any lawyer who is not by choice or by unendowment doomed to be hack or shyster--the best practical training, along with the best human training, is the study of law, within the professional school itself, as a liberal art."

The study of law as a liberal art of necessity means study that ranges broadly across both the history and scope of the law. The occasions, functions and perceptions of law are so varied and so variable that there is no ready formula for developing in students an understanding of the aspirations and institutions to which their chosen profession should minister.

Having then, in the best law school manner, dismissed the suggestions proffered the profession for changes in legal education, what do I have to offer, is anything? I have two suggestions to make which although modest in comparison to the more grandiose schemes I have just discussed, seem to me to be responsive to the problems that confront us.

First of all, we should discard the ideology of the case method. I say this not because the case method cannot be in the hands of a skilled and sensitive teacher an excellent method of teaching, but because in all too many classrooms the case method has become a tired and hollow shibboleth for teachers who are too distracted, too tired, or too unimaginative to offer more than the sacred litany. I am convinced from my discussions with law students from many parts of the country that the case method has come to mean nothing more than a sequence of questions of the following type.

Mr. Smith, please state the case of Blank V. Blank.

Mrs. Jones, is Blank V. Blank consistent with the cases of Blank V. Blank and Blank V. Blank?

Ah, Mr. Rogers, you disagree that the cases are consistent. Well, what do you think class?

The skills of case analysis and disputation than can be developed by this technique are important. But its excessive repetition generates boredom and more importantly, permits the teacher to offer too little of himself. The excellent student may flourish merely by being challenged. But a class needs not only the challenge of problems, but the example, from the teacher, of problems successfully solved. The law teacher -- as I am convinced good law teachers do -- must use the technique not only of case analysis but of the problem method, the lecture, and the simulated practice situation. Indeed, I am convinced that in the hands of a skilled and experienced teacher the classroom can offer experience which exceeds in its relevance, its drama, its immediacy and most importantly, its educational value, anything that clinical techniques can offer. The full development of these teaching skills -- comparable in my view as legal skills only to the organizational, presentational and dramatic skills of the trial lawyer -- require experience and conscious aspiration. Law schools have tended to assume that intellectual rigor combined with the case method formula were all it took to be a good teacher and as a consequence have minimized the experience and conscious striving required for excellence in the classroom.

My second suggestion for the law school curriculum is that the subjects of jurisprudence and the legal profession should play an important role in it. It is perhaps astounding that so little attention is now paid to these subjects in law schools. I do not find the explanation for this condition difficult. The modern American law school has no roots prior to 1870. The two great domestic crises it has faced have been crises not about the legal order but about the role of private and governmental economic institutions. The existing legal institutions have been called upon to shape solutions to those problems. Quite naturally, the law schools have looked to those problems to understand the law and its response to them. But our crisis today is not a crisis about our economic institutions, but a crisis of confidence in our legal institutions themselves. I fear that the pre-Civil War period offers the only analogy in American history. It matters not whether one attributes the present crisis of confidence -- as the radicals do -- to some conspiratorial establishment which manipulates the present structure in furtherance of its selfish, unprincipled and evil ends or whether one views the crisis -- as I do -- as the consequence of a false but widely held faith in the omnipotence of our society and our institutions. This faith has simply generated its own logical conclusion: omnipotent institutions are responsible for the obvious evils of the society which they should serve. The logic is the same as that of the Manichean heresey which so bedeviled the medieval church. I suspect that in our excessively secular society it will be equally persistent and corrosive. The crisis of confidence challenges the legitimacy of the existing legal order and must be met by legal education on its own terms. I have heard it argued that jurisprudence -- the study of the function and role of law -- is best taught by an examination of the actual development and operation of law in a specific context. That is true only as long as there is a conceptual consensus on which the legal system is and can be based. But the contemporary crisis is in substantial part an attack on that consensus and must be met on its own conceptual terms.

In a time of doubt about the role of law students have an increased concern about the professional function they will be called upon to play in practice. To the extent law schools have spoken to the subject at all, we have been much too glib with easy phrases about the lawyer as social engineer, the architect of the good society. The professional role is in fact more ambiguous, with the legal profession as much the determined as the determiner. The students see this, and ask with justification, what role, then does the legal profession play? My answer is an older one -- a process role in which the legal profession does not determine the policy outcome but provides a process alternative to violence for the resolution of differences within the society. Such a morally neuter if not castrated role does not sit easily with the young in a time when the call is to choose up sides. If we are to preserve the vitality of the legal profession in a time of conflict, however, then the merits of the role and its limitations must be frankly faced and argued with those we would recruit to it.